Circuit acknowledged *Thomas*, but found it "unpersuasive" as it was constructed entirely upon a distinction drawn between the decisions of administrative agencies and state courts. This distinction was plainly "immaterial," especially in light of the Supreme Court's decision in *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369, n. 4 (1989) (hereafter *NOPSI*), which had been issued two years after *Thomas*. *Majors*, 149 F.3d at 713.

In 1994, the Third Circuit also considered and expressly rejected *Thomas*, relying instead upon the Supreme Court's reasoning in *Huffman*. In *O'Neill*, the administrative proceeding at issue had become final because the losing parties did not request state court judicial review, but circumvented the state court by filing a federal lawsuit. The *O'Neill* court held that *Younger* precluded this federal court challenge to a state administrative determination. *O'Neill*, 32 F.3d at 791.

Like the instant case, *O'Neill* involved a challenge to the constitutionality of actions taken by a city in the enforcement of a city ordinance. Because the litigants paid their tickets without appealing to state court, *Younger* barred their later federal court challenge to the constitutionality of the city's actions. The *O'Neill* Court rejected the holding of *Thomas*, finding no meaningful distinction between litigants who chose not to appeal state agency decisions and those who abandon available appeals of state court decisions. The Court stated, "We have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court judicial review of the

agency's decision in order to apply for relief in federal court." *Id.* at 790-1.

O'Neill further undermined *Thomas* by pointing out that the Eighth Circuit had also disregarded *Thomas* in *Pomeroy*. *Id.*, citing *Pomeroy, supra.* There the Eighth Circuit did not expressly mention *Thomas,* which had been decided three years earlier, but it clearly rejected the *Thomas* reasoning. Like *O'Neill,* the *Pomeroy* court held that *Younger* abstention barred a federal court lawsuit challenging the constitutionality of a state administrative determination, where the litigant chose not to pursue an available avenue for judicial review in the state courts. *Pomeroy,* 898 F.2d at 1317-18, *see McCartney,* 896 F.2d at 1144 (8th Cir. 1990) ("Since *Huffman,* courts have consistently held that a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies.")

More recently, the First Circuit rejected the *Thomas* decision, calling it a minority view that had been rejected by other circuits. *Maymo,* 364 F.3d at 35, n. 9. The First Circuit aligned itself with the Third, Seventh and Eighth Circuits in the *O'Neill, Majors* and *McCartney* decisions, seeing no reason for "an automatic right to detour into federal court because unhappy with an initial answer" from a state agency. *Id.* at 35.

The Ninth Circuit has also disagreed with *Thomas,* although that opinion was later withdrawn. *Nevada Entertainment Industries v. City of Henderson,* 8 F.3d 1348 (9th Cir. 1993), *withdrawn and reh'g granted by,* 21 F.3d 895 (9th Cir. 1994), *later decided by,* 26 F.3d 131 (9th Cir.

1994) (affirming the district court's dismissal of plaintiff's claim on other grounds, and dismissing the city's challenge of the district court's refusal to abstain as moot), *cert. denied*, 513 U.S. 1078 (1995). In the withdrawn opinion, the Ninth Circuit found that *Younger* barred an action challenging the constitutionality of a zoning ordinance. The federal plaintiff had failed to appeal a city zoning decision to the state court, opting to wait until that decision became final, then filing a federal court lawsuit. The Ninth Circuit applied *Younger*, based upon a careful review of Supreme Court decisions, stating: "It is consistent with both *Younger* and *Patsy* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, where adequate state judicial review was available to the federal plaintiff." *Id.* at 1351-52 (discussing *Younger* and *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496 (1982)).

Numerous lower courts have added to the lopsided weight of authority against *Thomas*. *See, e.g. Phillips v. Virginia Bd. of Medicine*, 749 F. Supp. 715, 728 (E.D. Va. 1990) (noting that the Supreme Court's *NOPSI* decision directly contradicted *Thomas* and finds the effort in *Thomas* to distinguish *Huffman* "unconvincing"); *Harper v. Public Service Commission of West Virginia*, 291 F. Supp. 2d 443, 458 (S.D.W.Va. 2003), *rev'd on other grounds*, 396 F.3d 348 (4th Cir. 2005) (agreeing that *Thomas* is "unpersuasive and distinguishable"); *Murphy v. City of Manchester*, 70 F. Supp. 2d 62, 68 (D. N.H. 1999) (rejecting *Thomas* and holding that failure to appeal an administrative decision meant that state

proceedings were pending for purposes of the *Younger* doctrine); *Bongiorno v. Lalomia*, 851 F. Supp. 606, 613 (D. N.J. 1994) (noting *Thomas*, but then applying *Younger* to a final decision of a state administrative proceeding because there was a right to appeal to the state court); *Fore Way Express, Inc. v. State of Wisconsin*, 660 F. Supp. 310, 313 (E.D. Wis. 1987) (distinguishing *Thomas); Communication Telesystems Internat'l v. California Public Utilities Comm'n*, 14 F. Supp. 2d 1165, 1169 (N.D. Cal. 1998) (distinguishing *Thomas*); and *Moore v. City of Asheville*, 290 F. Supp. 2d 664, 667 (W.D.N.C. 2003) *affirmed and remanded*, 396 F.3d 385 (4th Cir. 2005) (the instant case).

The only other case cited by Petitioner, *PUCO*, does not offer *Thomas* any real support. The Sixth Circuit's reasoning on this issue in *PUCO* had no legs of its own, but rested entirely upon the rubric of *Thomas*. As *Thomas* has been roundly rejected, so too must *PUCO* fall. Further, the *PUCO* Court had an additional basis for declining to abstain: federal preemption. 926 F.2d at 573.

The holding of *PUCO* has further been called into question by a recent Sixth Circuit *en banc* ruling. *Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003), *rev'd on other grounds, Kowalski v. Tesmer*, __ U.S. __, 125 S. Ct. 564 (2004). The *Tesmer* court's analysis was solidly based upon this Court's ruling in *Huffman*. Although *Tesmer* involved the application of *Younger* to court proceedings instead of administrative proceedings, the reasoning was clear: the determining factor was whether the federal plaintiff had exhausted his avenues of appeal, not whether the state proceeding was final.

The court equated the plaintiff's choice not to appeal the unfavorable administrative outcome to a failure to exhaust his remedies. His federal court lawsuit was therefore barred. In no uncertain terms, the *Tesmer* court found that the state proceeding remained pending for *Younger* purposes "until a litigant has exhausted his state appellate remedies," even in cases "where a litigant has abandoned pursuit of state court relief." *Id.* at 689.

Petitioner not only claims this case results in an inter-circuit conflict, he also attempts to contrive an intra-circuit conflict. The petition cites one Fourth Circuit decision as conflicting with the decision below. Pet. 12 - 13. The weakness of this argument is self-evident: the supposedly conflicting decision is an unpublished summary disposition. *Sofer v. State of North Carolina Hertford Police Dept.*, 935 F.2d 1287 (4th Cir. 1991) (unpublished). In accordance with the Fourth Circuit Rules, unpublished dispositions like *Sofer* need not recite all of the relevant facts. 4th Cir. R. 36(b). Citation of unpublished dispositions is disfavored in the Fourth Circuit because these cases do not have precedential value. *Id.*, R. 36(c). Therefore, the unpublished opinion in *Sofer* cannot create an intra-circuit conflict with the published decision of the esteemed panel here. Pet. App. 42a.

The petition relies in a puzzling way on *Wooley v. Maynard*, 430 U.S. 705 (1977), a decision that does not fit the facts of this case. Pet. 21-23. As the court below correctly pointed out, the complaint here sought damages and a declaration that the City had violated Petitioner's constitutional rights. *Wooley* applies only

to cases seeking "wholly prospective" relief. *Id.* at 711. Petitioner's reliance on *Wooley* is not apt.[2]

Precious little is required to attain total harmony in the circuits about the application of *Younger* to appeals from the decisions of administrative agencies, in accordance with this Court's decisions in *Huffman, Dayton Christian Schools* and *NOPSI*. Five circuits have forged the judicial consensus reflected in the decision below. This prevailing majority view is now fully evolved in accordance with this Court's rulings. The now-outmoded minority view pressed by Petitioner is extant, if at all, in only two circuits, by reason of decisions issued eighteen and fourteen years ago. Based upon the impressive array of authority against *Thomas*, the Fifth Circuit will no doubt soon correct its course by reconsidering this obsolete ruling. The Sixth Circuit has already realigned its position through its *en banc* ruling in *Tesmer*.

Surely many other petitions before this Court pose more pressing and important issues. This Court's scarce resources should be devoted to cases presenting direct, vital and intolerable conflicts.

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[2] Petitioner's effort to recast the complaint to his liking cannot morph it into an important issue of federal law. If Petitioner were correct in saying that his complaint sought "wholly prospective relief" under *Wooley* and the Fourth Circuit erred in finding otherwise, then this case would be fact-bound. *Id.* at 711. In other words, if the petition is grounded on a claim that the Fourth Circuit erred on the facts - which it plainly did not - this error would be inconsequential and certiorari should be denied. No troublesome questions or conflicting precedents are posed in connection with the *Wooley* exception to *Younger*.

II. THE DECISION BELOW IS PLAINLY CORRECT.

The Fourth Circuit decision stands upon the firm foundation of this Court's *Younger* abstention jurisprudence. This Court's decisions in *Huffman* and *Dayton Christian Schools* serve as beacons that clearly guided this decision. Judges Niemeyer, Luttig and King painstakingly analyzed this Court's precedents and carefully applied them to the facts of the case. The result is a decision that is not only faithful to this Court's rulings, but also reflects the clear consensus forged in the circuits. In stark contrast, the *Thomas* decision urged by the petition continues to founder on the shoals of unpersuasive reasoning and immaterial distinctions.

The *Younger* doctrine is driven by the self-imposed rule of judicial restraint known as comity. Strong policies counsel against the exercise of jurisdiction where comity would be offended. *Dayton Christian Schools*, 477 U.S. at 626. This Court has charted a safe course away from these shoals by enumerating the core *Younger* concerns to be considered: (1) whether the federal action was duplicative, (2) whether the action would cast a direct aspersion on the capabilities and good faith of state appellate courts, (3) whether the action would disrupt the state's efforts to protect its important interests, and (4) whether the action was designed to annul the results of the state proceeding. *Huffman*, 420 U.S. at 608-9.

These core concerns are not the only directions provided by this Court. In a long series of cases

following *Younger*, this Court delineated unambiguous guideposts defining when and how *Younger* should be applied. *Huffman, supra.* (civil nuisance proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (attachment proceedings); *Moore v. Sims*, 442 U.S. 415 (1979) (child custody proceedings); and *Middlesex County Ethics v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (bar disciplinary proceedings). In particular, this Court held that *Younger* applied to state administrative proceedings, like the City's noise ordinance process here. *Dayton Christian Schools*, 477 U.S. at 628.

The Fourth Circuit did not take a new direction, stray off course or blaze a new trail here. It simply followed the course clearly charted by this Court and mirrored in the decisions of its sister circuits. The Fourth Circuit's decision is commendably thorough in its analysis, and did not miss one jot in explaining how this Court's rulings were considered and applied. However, there is not much here that is new or commands special attention from the Supreme Court.

The outcomes in these cases are predictable, sensible and practical and are solidly based upon both Supreme Court precedents and the judicial consensus in the circuits. If a defendant to a coercive administrative proceeding abandons an available avenue of appeal, *Younger* will bar a federal action that seeks effectively to annul the results of that administrative proceeding. There is no genuine split of authority, no divergence from this Court's precedents and no need for this Court to review this case.

III. PETITIONER VASTLY OVERSTATES THE IMPORTANCE OF THIS CASE.

This case applies only to one narrowly confined category of litigants: those who wish to short-circuit administrative proceedings and state-court judicial review by making federal cases out of their claims. Pet. App. 19a. It affects only those who have abandoned an available avenue of appeal in state courts because they prefer a federal court forum. Pet. App. 3a. Opening federal venues for forum-shoppers is hardly a top priority for the administration of justice. And this Court need not shield those who choose to default on their rights from the consequences of their inaction. This case simply does not merit further review.

Petitioner's challenge to the City's actions in enforcing its noise ordinance belonged in the state judicial system. If Petitioner was unhappy with the City's final decision, he was entitled to judicial review in state court. After all, the state court is primarily responsible for reviewing and overseeing state agencies.[3]

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[3] Petitioner seems to argue that the city noise ordinance overrides this Court's *Younger* decisions and controls which court system is empowered to judicially review the city's decisions. Pet. 15, 19, 26. It is axiomatic that a local ordinance issued by a city council cannot change *Younger* doctrine. No city council can, by its own authority, take away from the state court the ability to correct constitutionally infirm city decisions and give this power instead to a federal court. Nor can a city council, expand, contract or alter the proper scope of the exercise of jurisdiction by a federal court.

In its concluding paragraph, the petition asks this Court to "grant review to protect the rights of federal plaintiffs to have their constitutional rights protected by the federal court." Pet. 27. This request suggests that Petitioner may assume that he has a right to vindicate his federal claims in a federal forum. However, this Court has repeatedly - and again very recently - explained that this assumption is not well founded. *San Remo Hotel, L.P. v. City and County of San Francisco*, ___ U.S.___, 2005 WL 1421451, at *1 (June 20, 2005) (state proceedings can "deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court," even when the plaintiff "would have preferred not to litigate in state court").

Furthermore, state courts have the solemn responsibility, equally with the federal courts, to guard, enforce, and protect every right granted or secured by the U.S. Constitution. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974). For the vigilant party who pursues every available remedy, *Younger* abstention does not impair their constitutional rights. After all, the state courts that oversee these administrative determinations have inherent authority and are competent to adjudicate claims arising under the laws of the United States. *Tafflin v. Levitt*, 493 U.S. 455 (1990); *See The Federalist*, No. 82.

Petitioner did not need to file a federal lawsuit to protect or vindicate his constitutional rights because he could have exhausted his administrative remedies, and then, if still unsatisfied, obtained judicial review in state court. By choosing not to pursue his appeal, he abandoned those rights. The mere fact that Petitioner

wanted a second bite at the apple - and wanted to chew it in federal court - does not mean that this is guaranteed by "Our Federalism."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Sharon Tracey Barrett
Counsel of Record
Cindy M. Rice
PATLA, STRAUS,
ROBINSON & MOORE, P.A.
29 North Market Street
Post Office Box 7625
Asheville, North Carolina 28801
(828) 255-7641

Robert W. Oast, Jr.
Curtis W. Euler
CITY ATTORNEY'S OFFICE
Post Office Box 7148
Asheville, North Carolina 28802
(828) 259-5610

Attorneys for Respondent

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No. 04-1593

IN THE

Supreme Court of the United States

CARROLL MOORE,

Petitioner.

v.

CITY OF ASHEVILLE, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of record)
Erik W. Stanley
Anita L. Staver
Rena M. Lindevaldsen
Mary E. McAlister
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100
Attorneys for Petitioner

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ARGUMENT

I.

THE CIRCUIT COURTS ARE SPLIT ON THE APPLICABILITY OF *YOUNGER* ABSTENTION WHEN A STATE PROCEEDING HAS BECOME FINAL.

Respondent does not deny the existence of a Circuit split on the issue presented by this Petition. Respondent's argument is limited to the contention that the Circuit split is not worthy of resolution because the cases supporting Petitioner are, according to Respondent, stale and the cases opposing Petitioner have developed a consensus among themselves. Respondent also contends that the Circuit split is not worthy of resolution because the Circuits opposing Petitioner have criticized the reasoning of the Circuits supporting Petitioner's arguments in this case. Respondent also states that Petitioner has missed Circuit court cases that state the majority position. All Respondent has done is to highlight the existence of the Circuit split that exists on the issue presented in the Petition and also highlighted the fact that the split actually exists and needs resolution.

This Court candidly stated that the issue presented by this case has never been squarely addressed. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369 n.4 (1989). However, the issue has been addressed squarely by several lower courts, with divergent results.

As Respondent has acknowledged, the Fifth and Sixth Circuits (and the Eleventh Circuit by importation of the Fifth's precedent) clearly hold that when state proceedings

have become final, *Younger* abstention is not appropriate even though state judicial remedies were available to a plaintiff. *See Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987); *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978)[1]; *Norfolk & Western Railway Co. v. Public Utilities Comm'n. of Ohio ("PUCO")*, 926 F.2d 567 (6th Cir. 1991).

In contrast, other Circuit courts have held that a plaintiff is required to exhaust all judicial remedies in order to bring suit in federal court, and that if some state remedy is available to the plaintiff, *Younger* abstention is appropriate even if the state proceedings are final. *See O'Neill v. City of Philadelphia*, 32 F.3d 785 (3d Cir. 1994); *Allegheny Corp v. Haase*, 896 F.2d 1046 (7th Cir. 1990); *Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990).

Petitioner did not ignore cases as the Respondent suggests. The First Circuit case of *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27 (1st Cir. 2004) is inapposite. In that case, *Maymo* brought a federal lawsuit to challenge the suspension of his horse training license. At the time of the filing of the federal lawsuit, *Maymo's* license had been suspended by the Racing Administrator under one case. *Id.* at 30. *Maymo* filed the federal lawsuit and, two days later, petitioned the Racing Board for review of the Racing Administrator's suspension. *Id.* The Racing Administrator returned the petition for review because of the federal court

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[1] Because the *Sills* case was decided prior to 1981, it is binding precedent in the Eleventh Circuit. *See Bonner v. Pritchard*, 661 F.2d 1206 (11th Cir. 1981). The Eleventh Circuit has no precedent to the contrary of *Sills*. *Sills* remains the rule in that Circuit. Therefore, the Circuit split in this case encompasses the Eleventh Circuit together with the Fifth and Sixth Circuits.

litigation. *Maymo* also had another case pending where the Racing Board had suspended his license for five years. *Maymo* sought review of that action in the state court. The state court affirmed the suspension and *Maymo* filed a petition for reconsideration. *Id.* at 32. *Maymo* then filed a second federal lawsuit while his petition for reconsideration was pending. *Id.* The First Circuit held that abstention under *Younger* was appropriate because both state cases were pending at the time of both federal lawsuits. In the first case, *Maymo* had petitioned the Racing Board to review the Administrator's decision to suspend his license. In the second case, *Maymo* had an ongoing state appeal petition for reconsideration pending.

The First Circuit distinguished a previous case entitled *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987). In that case, Kercado was terminated from her teaching position. *Id.* at 257-58. The order said it would take effect ten days after receipt unless Kercado chose to appeal to the Board of Appeals for the Public Education System. *Id.* Kercado instead filed a federal lawsuit. The First Circuit held abstention under *Younger* was inappropriate.

In reconciling *Kercado* and *Maymo*, the First Circuit stated, "There is a spectrum stretching from *Huffman [v. Pursue*, 420 U.S. 592 (1975)] to *Patsy [v. Board of Regents*, 457 U.S. 496 (1982)] and *Kercado-Melendez* may be in the middle; but Maymo's situation is clearly at the *Huffman* end.

Factually, *Maymo* is distinguishable from the present case. In *Maymo*, the state cases were pending at the time of the federal lawsuits. One was pending before the Racing Board and one was pending before the state court of appeals. In the present case, Petitioner's state administrative proceedings were final and there were no pending state court proceedings. Factually, *Maymo* is inapposite from the present case.

Further, *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998), is also inapposite. In that case, a hospital had suspended Majors' nursing license. In mid-November, 1995, the State Board of Nursing set a hearing on the revocation of the license for December 18, 1995. *Id.* at 711. A few days after the hearing was set, Majors filed a federal lawsuit seeking to enjoin the revocation of his license. *Id.* In the midst of the federal case, the State Board revoked Majors' license and Majors filed a petition in state court asking the state court to reinstate his license. *Id.* at 712. The Seventh Circuit abstained under the principle that the state case was clearly ongoing at the time of the federal lawsuit. *Id.* at 713.

Majors is clearly inapposite because the administrative proceeding was not final and a state court review proceeding was filed in the midst of the federal lawsuit.

Respondent contends that Petitioner also neglected to mention the case of *Allegheny Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990). However, Petitioner did mention the Eighth Circuit case of *Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990), which was a companion case decided the same day as *McCartney*. The rule announced in *Pomeroy* was the same rule announced and applied in *McCartney*. The Eighth Circuit's position on the issue presented in this case is clear and stands in opposition to the Fifth, Sixth and Eleventh Circuit's position.

Contrary to Respondent's argument, the Fifth and Sixth Circuit decisions are not stale. The Fifth and Sixth Circuit cases are considered settled law in those circuits. The precedents have not become stale. The Fifth Circuit's decision in *Thomas* relied upon the previous case of *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978). *Sills* has been cited with approval in the Fifth Circuit. *See Louisiana Debating and Literary Ass'n. v. City of New*

Orleans, 42 F.3d 1483 (5th Cir. 1995); *Giles v. City of Prattville*, 556 F. Supp. 612 (M.D. Ala. 1983). Further, *Thomas* has been cited with approval in the Fifth Circuit. *See Geotes v. Mississippi Bd. of Veterinary Medicine*, 986 F. Supp. 1028 (S.D. Miss. 1997). Neither *Thomas* nor *Sills* have been overruled or questioned by the Fifth Circuit. Far from being stale, the two cases have become settled precedent in the Fifth Circuit.

Additionally, the Sixth Circuit's precedent is not stale. The *PUCO* case has not been overruled and continues as good precedent in the Sixth Circuit. Contrary to Respondent's argument, the *PUCO* case has not been called into question by *Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003)(en banc). *Tesmer* is inapposite. In *Tesmer*, three indigent defendants in state criminal proceedings and two attorneys regularly appointed as defendant's counsel filed suit against a Michigan statute that prohibited the appointment of counsel for an indigent defendant on appeal if the defendant pled guilty or nolo contendere. *Id.* at 686. The Sixth Circuit held abstention was appropriate as to one of the criminal defendants because, even though his application for leave to appeal was denied, under Michigan's procedural rules, he had a certain time period to file for leave to appeal with the Michigan Supreme Court. *Id* at 689. Instead of filing with the Michigan Supreme Court, the defendant filed the federal lawsuit. The Sixth Circuit held that abstention was appropriate because, by seeking injunctive relief, the defendant was attempting to obtain federal review of state proceedings before the state proceedings were fully decided. *Id.*

The *Tesmer* case never even cited *PUCO* in its discussion whether the state court cases were ongoing. Further, *PUCO* addressed the question of when a state administrative

proceeding had become final, but no state court action had been instituted to review the administrative proceeding. That is a different case than *Tesmer* where state court proceedings were clearly pending at the time of the federal lawsuit. *Tesmer* in no way calls into question the Sixth Circuit's decision in *PUCO* and *PUCO* has in no way been overruled or called into question by the Sixth Circuit.

The bare fact that the Circuits in opposition to the Fifth, Sixth and Eleventh Circuits have developed a consensus among themselves is irrelevant to the existence of the Circuit split that still exists and needs resolution by this Court. Simply because some of the Circuits have criticized the reasoning of other Circuits does not mean that a split does not exist. In fact, criticism of the Fifth and Sixth Circuit's decisions in *Thomas, Sills,* and *PUCO* highlights that the Circuit Courts are in disagreement as to the application of *Younger* abstention when state administrative proceedings are final and no state court action is instituted to review those proceedings, but a federal lawsuit is filed. The Fifth and Sixth Circuits (and the Eleventh by importation of the Fifth's precedent in *Sills*) have remained impervious to the criticism leveled by some of the Circuits who stand in opposition to the rules in those cases.

Respondent also argue that the Fourth Circuit's decision in *Sofer v. State*, 935 F.2d 1287, 1991 WL 107545 (4th Cir. 1991), should be disregarded because it is an unpublished decision of no precedential value in the Fourth Circuit. This is not true under the Fourth Circuit's rules for citation of unpublished decisions. While citation to an unpublished decision is normally disfavored, the Local Rules of the Fourth Circuit state:

> If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in

> relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.

Fourth Circuit Local Rule 36(c). In the present case, the *Sofer* decision has precedential value for the abstention issue and there is no other published decision in the Fourth Circuit that serves as well to highlight the internal inconsistency in the Fourth Circuit on this issue. The *Sofer* decision may be cited in the Fourth Circuit as precedent and thus should be considered by this Court in deciding whether to accept this Petition. *Sofer* stands in direct conflict with the present case in the Fourth Circuit. The two cannot be reconciled. Thus, the Fourth Circuit is even at odds with itself over the issue presented in the Petition.

Petitioner has not overblown the conflict in the Circuits on this issue. The Fifth, Sixth and Eleventh Circuits (and one decision in the Fourth Circuit) stand in direct opposition to the Third and Eighth Circuits which are in agreement with the Fourth Circuit (in this case) on the issue presented in this Petition. Respondent has done nothing but to highlight the split that is evident in the lower courts on the issue presented in this case.

II.

THE ISSUE PRESENTED IN THE PETITION IS ONE OF GREAT PUBLIC IMPORTANCE THAT THE DISTRICT COURT INCORRECTLY DECIDED.

Respondent contends that this case is unimportant because it applies to "one narrowly confined category of litigants." *See*